Waimiri v Njenga & 2 others (Civil Appeal 83 of 2019)
[2023] KEHC 438 (KLR) (20 January 2023) (Judgment)

Neutral citation: [2023] KEHC 438 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CIVIL APPEAL 83 OF 2019

DK KEMEI, J

JANUARY 20, 2023

BETWEEN

MUCHIRI GILBERT WAIMIRI ..... APPELLANT

AND

PAUL NJENGA ..... 1ST RESPONDENT

RAYAN LOGISTICS ..... 2ND RESPONDENT

JUMA MOHAMMED HASHI ..... 3RD RESPONDENT

(An appeal from the Judgment of Hon. M. Munyekenye (Principal Magistrate) delivered on 11th September 2019 at Webuye in Webuye PMCC No. 33 of 2017, Muchiri Gilbert Waimiri vs Paul Njenga, Rayan Logistics & Juma Mohammed Hashi)

JUDGMENT

1. According to the pleadings in the trial court, the Appellant brought this action in the Principal Magistrates Court at Webuye against the Respondents for damages in the sum of Kshs 923, 550/= plus loss of user at the rate of Kshs 5,000/ per day from the date of the accident until payment in full plus costs of the suit and interest.

2. It was pleaded that on September 19, 2016 the Appellant's motor vehicle registration number xxxx was lawfully being driven along Eldoret -Webuye road at Mukhonje area when the 3rd Respondent so negligently drove and/or managed motor vehicle registration number xxxx that he caused it to ram onto motor vehicle registration number xxxx which was completely off the road thereby causing it extensive damage and that the Appellant suffered loss and damage and he holds the Respondents wholly liable for the accident.

3. The parties recorded a consent on liability at 10%:90% with the Appellant bearing 10% contributory negligence while the Respondents shouldered 90% of liability. It is only the appellant who tendered

evidence on the assessment of quantum of damages. The trial court vide a judgement dated September 11, 2019 found that the appellant was only entitled to the pre-accident value of Kshs 1,000,000/ less the salvage value of Kshs 280, 000/ giving the sum of Kshs 720, 000/. The trial court also awarded cost of assessor's fee of Kshs 5000/ plus towing charges of Kshs 15,000/ all subjected to 10% contribution leaving a net sum of Kshs 787, 500/. The trial court also awarded costs of the suit and interest at court rates.

4. Aggrieved by the judgment, the Appellant filed a memorandum of appeal dated September 19, 2019. The appeal is mainly on the trial court's finding on quantum. The grounds of appeal are: -

    a. That the learned trial magistrate erred both in law and in fact in disregarding the Appellant's claim for loss of use when the same was properly pleaded and evidence tendered.

    b. That the learned trial magistrate erred both in law and in fact in making a finding that the claim for loss of use was not pleaded contrary to pleadings already on record.

    c. That the learned trial magistrate erred both in law and in fact in departing from the expert evidence tendered and thus made an erroneous award.

    d. That the learned trial magistrate erred both in law and in fact in failing to take into account the evidence and submission of the Appellant which led to a wrong conclusion.

    e. That the learned trial magistrate erred both in law and in fact in departing from the principle of assessing damages which led to an erroneous assessment of damages due to the Appellant.

5. The appeal was canvassed by way of written submissions. submissions. The respondents filed their submissions dated July 8, 2022 while the appellant relied on his submissions that had been filed before the lower court.

6. This being the first appeal I am required to consider the evidence adduced, evaluate it and draw my conclusions, bearing in mind that I did not hear and see the witnesses who testified. See Selle & Another Vs Associated Motor Boat Company Ltd & Others [1968] EA 123.

7. The Appellant submitted that the pre-accident value of the vehicle was Ksh 1, 180,000/= and salvage of Kshs 280,000/=. As per the assessment report, it was concluded that the vehicle was damaged beyond any scope of repair. Counsel relied on the case of Nkuene Dairy Farmers Co-op Society Ltd & another v Ngacha Ndeiya (2010) eKLR, and *Ratcliffe v Evans (1892) 2QB 524*. On the loss of user, the Appellant submitted that he was using the motor vehicle for public transport making Kshs 5,000/= a day. Counsel relied on the case of *Lewa Wildlife Conservancy vs Geoffrey Gatobu Japheth (2015) eKLR*.

8. In opposing the appeal, the Respondents submitted that the trial Magistrate did not err when she made a finding that the Appellant did not plead loss of user in his Plaint thus disregarding the same. According to the Counsel, the relevant paragraph on the loss of user as contained in the Plaint read '10. The Plaintiff further avers that his vehicle was for public transport and his source of income and he shall pray for loss of use at the rate of Kshs 5,000/= per day from the date of the accident until payment in full'. It was submitted that subject to this the Appellant did not expressly pray for loss of user in the said paragraph as the wording on the same was in future time reference and/or future tense, and not one to be made in the trial suit. The Respondent submitted that as a general rule, pleadings drafted ought not to be ambiguous in their wording and the same could have been remedied by an amendment. Counsel urged this Court to uphold the finding of the trial Court on the claim of loss of user. Counsel relied on the case of *James Ndung'u Kero vs Chief Land Registrar & 2 Other (2022) eKLR*.

9. Counsel submitted that should this Honourable Court be persuaded that the Appellant properly pleaded in the Plaint, the claim of loss of user, they urged this Honourable Court to consider that

the Appellant vide the assessment report produced as Exhibit 6 (a) led evidence to the fact that the Appellant's vehicle was declared a write off as the repair cost was beyond any scope of economic repair and as such the Appellant is not entitled to the claimed relief. Counsel relied on the case of Permuga Auto Spares & Another vs Margaret Korir Tagi (2015) eKLR and *David Bagine vs Martin Bundi (1997) eKLR.*

10. It was submitted that the trial Court took into consideration the availed evidence about the pleaded damages. The Appellant only availed evidence of the assessment report that valued the motor vehicle at Kshs 1, 180,0000/= but failed to have the author of the same produce and or testify on the same report. The Appellant also failed to avail evidence of the assessment report, photos, and established mechanical condition of the suit motor vehicle at the time of purchase to justify the current assessment after the work and improvements done on the motor vehicle.

11. It was submitted that the award by the trial Court of pre-accident value less salvage value at Kshs 720,000/= an award which the Respondent's concurred with as it clearly showed the trial Court did an analysis of the expert evidence presented before the trial court and proceeded to arrive at her findings.

12. It was submitted that this Court ought to be aware that the decretal sum was already settled and if the appeal succeeds, awarding the interest would be tantamount to double compensation.

13. I have considered the rival submissions and the authorities cited. I have also re-evaluated the evidence which was tendered before the trial court for consideration.

14. It is clear that the appeal is challenging the trial court's finding on quantum, specifically the lack of award under the loss of user. I, therefore, deem it practical to address the five (5) grounds of appeal contemporaneously under one head.

15. I have considered the foregoing. This being a first appellate court, it was held in Selle vs Associated Motor Boat Co [1968] EA 123 that:

> ' The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.'

16. My duty as a first appellate court is to re-evaluate the evidence adduced before the trial court and come up with my own findings. While doing this, I ought to be minded that 'an appeal court would not normally interfere with the finding of facts by the trial court unless it is based on no evidence or it is based on misapprehension of the evidence or the judge has acted on wrong principle in reaching the finding he did.' (See *Sumaria and Another vs Allied Industries Limited 2017 eKLR* and *Ephantus Mwangi and Geoffrey Nguyo Ngatia v Duncan Mwangi Wambogo (1982-88) 1KAR 278*).

17. Therefore, this court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial court, analyze the same, evaluate it and arrive at its own independent conclusions, but always remembering, and giving allowance for it, that the trial court had the advantage of hearing the parties.

18. I now turn to the issue of quantum. It is trite law that an appellate court can only interfere with an award of damages where the award was either based on wrong principles or is so inordinately high or low as to be a wholly erroneous estimate (See *Kemfro Limited t/a Meru Express Services v Lubia and Another [1987] KLR30*).

19. The principle espoused in the law of tort is to restitute a victim of a tortious act to as much as possible to where he would have been if he had not suffered the tort (restitution in integrum). The rationale for the rule that special damages must be strictly proved is to police the practice so that Plaintiffs do not present exaggerated claims not tied to actual losses. The rule is, therefore, that a party claiming special damages must demonstrate that they actually made the payments or suffered the specific injury before compensation can be considered or otherwise demonstrate with the permitted degree of certainty what loss or amount, he will suffer in the future.

20. In the present case, the Appellant demonstrated with reasonable certainty what loss he had suffered. It was not in dispute that the accident led to the Appellant's vehicle being extensively damaged and that the author of the relied-upon assessment report was not brought forth to testify on the same document. On my perusal of the Plaint, it is elaborate that the Appellant failed to plead the loss of user prayer under his prayers section and from my analysis of paragraph 10 it was elaborate that the Appellant ought to have done the same to substantiate the same. The same paragraph gives this court the perception that the Appellant would opt for the same prayer in the future when he failed to include the same in his specific prayers to the trial court.

21. I do concur with the trial court in its judgement holding that:

> ' During the hearing the Plaintiff put forth a claim for loss of user. I do not wish to belabour on this point either. In Suleiman Rahemtulla Omar & Another vs Musa Hersi Fahiye & 5 Other (2014) eKLR it was well established principle that parties are bound by their pleadings. The Plaintiffs in his Plaint did not at any paragraph plead for loss of user and it is not an issue before this court for determination. The submission on loss of user is thus disregarded'

22. The Appellant is only entitled to compensation of the differential amount between the vehicle's pre-accident value and the salvage value which claim the appellant failed to make. I do concur with the decision relied upon by the respondents' counsel namely Permuga Auto Spares & Another V Margaret Korir Tagi [2015] eKLR where Mulwa J held that;

> ' It is the courts view that once a vehicle has been written off the only compensation is the pre-accident value, less salvage value as assessed and other reasonable consequential expenses that are subject to proof. There would ordinarily be assessment charges, towing charges, excess but not loss of user. The payment of the pre-accident value is made to bring the owner to as near as possible to the state he would have been if not for the accident and loss. In the court's view, to award damages for loss of user as well as the pre-accident value and other consequential losses would be to award double compensation. The claim for loss of user is disallowed.'

23. The trial court relied on the sale agreement that showed the appellant purchased the motor vehicle at 1, 000,0000/= and noted that the Appellant failed to avail evidence of the works done on the motor vehicle for her to rely on the current assessor's report that put the motor vehicle's value at 1, 180,000/ = as he failed to avail receipts to show the trial court how much money he used to bring the motor vehicle to a higher value than he bought it for.

24. It is my view that the Appellant did not discharge the burden of proof that the pre-accident value of the vehicle was Kshs 1,180,000/= as required under section 107 of the *Evidence Act*. The learned counsel referred to PW1's evidence and the loss assessment report p exhibit-6 (a) which was not challenged in any material aspect during cross-examination but failed to avail the requisite evidence in this case, receipts, to show that indeed he did work on the vehicle to improve its appearance and mobility. Motor Vehicles are categorized as wear and tear and they generally depreciate in value once used. To place the court in an arena to grant his prayers, the Appellant ought to have availed the necessary receipts that indicated that he indeed appreciated the value of the motor vehicle since purchase and not just choose to rely on a valuation report.

25. The decision of Nkuene Dairy Farmers Co-Operative Society Limited Vs Ngacha Ndeiya [2010] eKLR as relied upon by the Appellant is not relevant in this particular case as we are dealing with a motor vehicle that had been written off and that the same could not be salvaged. In the foregoing, the Court of Appeal however has held that:

> ' In our view special damages in a material damage claim need not be shown to have actually been incurred. The claimant is only required to show the extent of the damage and what it would cost to restore the damaged items to as near possible condition as it was before the damage complained of. An accident assessor gave details of the parts of the respondents' vehicle which were damaged. Against each of them, he assigned a value. We think the particulars of damage and the value of the repairs were given with some degree of certainty.'

26. In the upshot the trial court's reliance on the sale agreement pre-accident value in this matter was the safest and best option as it was well ascertained and proved. I concur with its decision. In any event, it is common knowledge that the value of vehicle depreciates with each passing period and that it is immaterial if any repairs are effected and hence the claim for Kshs 1,180,000/ as the pre-accident value must fail. Finally, the issue of loss of user was not properly pleaded as the appellant hid the total amounts set to be claimed vide paragraph 10 of his plaint and further failed to list the said amount on the part dealing with final prayers ostensibly to avoid being charged court fees. Definitely, if it was a serious prayer, he would have expressly disclosed them. He cannot blame the trial court for reading through his mischief. He must be contented with what he pleaded and disclosed. Again, the vehicle having been declared a write off, it was futile for the appellant to try and repair it but to get the pre-accident value less salvage value.

27. As regards the special damages on assessor's fees, towing charges and search fees, I find that the same was not in contention and hence the same will remain undisturbed.

28. In view of the foregoing observations, it is my finding that the appeal herein lacks merit. The same is dismissed with costs to the Respondents.

It is so ordered.

DATED AND DELIVERED AT BUNGOMA THIS 20TH DAY OF JANUARY, 2023

D.K. KEMEI

JUDGE

In the presence of :

Kinyanjui for the Appellant

Miss Opinde for the Respondents

Kizito Court Assistant